

EXHIBIT B

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MAXIMILIAN KLEIN and SARAH GRABERT,
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware Corporation
headquartered in California,

Defendant.

Case No. 5:20-cv-08570-LHK

**[PLAINTIFFS' PROPOSED]
FEDERAL RULES OF EVIDENCE
502(D) CLAWBACK ORDER**

Judge: Hon. Virginia K. DeMarchi

Pursuant to Federal Rules of Evidence 502(d), the inadvertent production or disclosure of any documents and accompanying metadata (“Protected Documents”), protected from discovery, including under the attorney-client privilege, work product doctrine, opinion work product doctrine, the joint defense or common interest privilege, privacy laws and regulations, or any other immunity from discovery (collectively “privilege or protection”), does not result in the waiver of any privilege or protection, including subject matter waiver, associated with such Protected Documents as to the receiving party or any third parties in this or in any other state or federal proceeding regardless of the circumstances of production. This Order provides the maximum protection allowed by Federal Rule of Evidence 502(d) with regard to Protected Documents. Federal Rule of Evidence 502(b) does not apply to any disputes regarding Protected Documents, and instead this Stipulated 502(d) Order governs all disputes regarding Protected Documents produced in this litigation. Nothing contained herein requires the production of Protected Documents.

1. CLAWBACK AGREEMENT

In the event that a producing party discovers that it produced Protected Document(s), it shall provide written notice of the claim of privilege or protection to the receiving party (a “Clawback Notice”), sufficiently identifying the Protected Document(s) within a reasonable time.

As soon as practicable or within a reasonable time after providing the Clawback Notice, the producing party shall provide (i) if only a portion of the document contains privileged or protected material, a new copy of the document utilizing the same bates number(s) as the original that has been redacted to protect the privilege or protected material; or (ii) if the entire document is privileged or protected, a slip sheet identifying the same bates number(s) as the original noting that the document has been withheld. Any Protected Document that is the subject of a Clawback Notice will be included on a privilege log if and as required by the privilege-logging procedures agreed to by the parties or ordered by the Court.

2. PROCEDURES FOLLOWING CLAWBACK NOTICE

a) Within ten (10) business days of receipt of a Clawback Notice (regardless of

whether the receiving party agrees with or plans to challenge the producing party's claim of privilege or protection), the receiving party must use reasonable efforts to return, sequester, or destroy the Protected Document(s), all copies thereof, and any notes that reproduce, copy, or otherwise disclose the substance of the Protected Documents and certify to the producing party when this return, sequestration, or destruction is complete.

b) If a receiving party challenges a claim that a Protected Document specified in a Clawback Notice is privileged or protected, the receiving party shall notify the producing party of its challenge within 14 business days of receiving the Clawback Notice. However, to the extent a Producing Party seeks to claw back more than 100 documents within a 7-day period, the Receiving Party shall be provided with an additional 7 business days to challenge the Clawback Notice.

c) Within 14 business days of the producing party receiving notification of the challenge, the parties shall meet and confer in an effort to resolve their disagreement. If the parties are unable to resolve their disagreement, they shall comply with the discovery dispute resolution procedure outlined in Judge DeMarchi's Standing Order for Civil Cases. If such a motion is made, the parties shall submit to the Court for *in camera* review a copy of the Protected Documents in connection with its motion papers.

d) The receiving party must not otherwise use or disclose the Protected Document(s) covered by the Clawback Notice during the time in which the receiving party is challenging the Protected Document(s).

e) The parties may stipulate to extend the time periods set forth in paragraphs (a)-(c) as appropriate.

3. PROCEDURE UPON DISCOVERY BY A RECEIVING PARTY OF PRODUCED PROTECTED DOCUMENTS

In the event that a receiving party discovers that it has received or examined Document(s) that it reasonably believes are or may be privileged or protected, the receiving party promptly shall stop reading or reviewing the document (with the exception of for the limited purpose of

1 challenging a Clawback Notice) and (i) sequester the Document(s), and (ii) within four business
2 days of such discovery, notify the producing party of the possible production or disclosure by
3 identifying the bates range(s) of the Document the receiving party reasonably believes are or may
4 be privileged or protected, and were or may have been produced or disclosed (a “Production
5 Notice”). Upon the producing party receiving a Production Notice, if the producing
6 party determines that the subject documents are privileged or protected, and timely serves a
7 Clawback Notice within four business days of receipt of the Production Notice, the receiving party
8 shall use reasonable efforts to return, sequester, or destroy the Protected Document(s) as described
9 in Section 2 above, and the producing party shall promptly provide any replacement images as
10 described in Section 2 above.

11 **4. PROCEDURES DURING DEPOSITION AND HEARING**

12 a) If, during a deposition, a producing party claims that a document being used in
13 the deposition (e.g., marked as an exhibit, shown to the witness) contains material that is privileged
14 or protected, the producing party may, in its sole discretion, do one or more of the following: (a)
15 allow the Protected Document to be used during the deposition without waiver of any claim of
16 privilege or protection; (b) allow questioning about the Protected Document but instruct the
17 witness not to answer questions concerning the parts of the Protected Document containing
18 privileged or protected material; or (c) object to the use of the privileged or protected portion of
19 the Protected Document at the deposition. In all events, once the Protected Document is no longer
20 in use at the deposition, the receiving party shall immediately sequester all copies of the
21 Protected Document. As to any testimony subject to a claim of privilege or protection, the
22 producing party shall serve a Clawback Notice within ten business days after receipt of
23 the rough transcript of the deposition, after which the parties shall follow the procedures set forth
24 in Sections 2 and 3, as applicable. Pending determination of any challenge to such
25 a Clawback Notice, all parties with access to the deposition transcript shall treat the relevant
26 testimony in accordance with Section 2(d). In the event the Court decides the clawback dispute in
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1 the receiving party's favor and the receiving party was denied the opportunity to examine a witness
2 as to the materials at issue, the witness shall be made available as soon as practicable after the
3 Court's decision.

4 b) If a receiving party uses discovery materials in a brief or at a hearing (other than in
5 papers referred to in Section 2(c) above), and the producing party has not served
6 a Clawback Notice as to those materials in advance of the briefing event or hearing, the producing
7 party must promptly object and serve a Clawback Notice within ten business days of receipt of the
8 briefing or the hearing. Thereafter, the procedures set forth in Section 2 apply. To the extent any
9 privileged or protected material is placed into the public record in connection with briefing or a
10 hearing, and the Producing Party timely serves a Clawback Notice, the receiving party shall (a)
11 withdraw the portion of the briefing and exhibits that contain privileged or protected material, (b)
12 request the court seal that material, or (c) join or not oppose a motion to seal the privileged or
13 protected material.

14 c) Notwithstanding the foregoing, any document used by any Party in a deposition,
15 expert report, or court filing in this action (with the exception of a motion pursuant to Section 2(c)
16 above), that a Producing Party does not clawback within ten business days of use ("Used
17 Document") shall not be eligible for clawback under this Order. Such ineligibility for clawback
18 of that document under this Order shall not result in a subject matter waiver in any other state or
19 federal proceeding.

20 **5. PROHIBITION ON USE OF PRIVILEGED INFORMATION**

21 To the extent any party is aware that it has obtained Protected Documents, has received a
22 Clawback Notice, or it is reasonably apparent that the party has obtained privileged or protected
23 information through production, disclosure, or communications, such Protected Documents and/or
24 information may not be submitted to the Court, presented for admission into evidence, or sought
25 in discovery in this proceeding or in any other proceeding or action (with the exception of a motion
26 pursuant to Section 2(c) above). The party must promptly notify the opposing party of its
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1 possession of such privileged information and certify the return, sequestration, or destruction of
2 the Protected Documents and/or information within a reasonable time as described in Sections 2
3 and 3 above.

4 **6. MISCELLANEOUS**

5 a) A party is not precluded by this Stipulation and Order from arguing that a privileged
6 protection has been waived for reasons other than the production of a document or information
7 subsequently clawed back in accordance with the terms of this Stipulation and Order.

8 b) Nothing in this Stipulation and Order is intended to preclude either party from
9 seeking fees or expenses associated with unreasonable or excessive clawback of documents.

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11 PURSUANT TO STIPULATION, IT IS SO ORDERED.

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13 DATED: _____
14 Virginia K. DeMarchi
15 United States Magistrate Judge
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